Supreme Court, U.S.
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No. 93-1684

In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL HIRANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an indictment for impersonating a federal officer, in violation of 18 U.S.C. 912, must allege that the defendant acted with "intent to defraud."

2. Whether petitioner waived his objection to duplicity in the indictment by failing to raise the objection before trial pursuant to Fed. R. Crim. P. 12(b)(2).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 14 F.3d 597 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1993. A petition for rehearing was denied on January 24, 1994. The petition for a writ of certiorari was filed on April 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on three counts of impersonating a federal employee, in violation of 18 U.S.C. 912. He was sentenced to four months' imprisonment, to be followed by one year of supervised release. C.A. App. 200-203.

1. Petitioner impersonated a federal employee on three occasions in order to obtain information about Mary Brett, a librarian at George Mason University (GMU) Law School, and her ex-husband, Larry Brett. On August 1, 1992, petitioner told Kelly Dodson, a GMU police officer at the law school, that he worked for "the agency." After placing a telephone call, petitioner handed the phone to Dodson, who heard the person answering say "Federal Bureau of Investigation." Petitioner took back the phone, recited some purported codes, and hung up. Petitioner claimed that the telephone call verified his identity. He then asked Dodson for a police report concerning Mary Brett. Pet. App. 2a; Gov't C.A. Br. 6.

Three days later, petitioner told Michael Crawford, another GMU security guard at the law school, that he was a Department of Defense employee, and he asked Crawford for information concerning Larry Brett. Petitioner said that Brett was suspected of engaging in terrorist activities. Crawford referred petitioner to Maurice Sobel, another GMU police officer. When Sobel telephoned Crawford later that evening, Crawford allowed petitioner to speak to Sobel. During that conversation, petitioner again requested information about Larry Brett. Pet. App. 2a; Gov't C.A. Br. 6-7.

On August 14, 1992, petitioner telephoned GMU's security office, and he again spoke to Officer Sobel.

Petitioner identified himself as Sergeant Harris of the Bolling Air Force Base security staff. He said that Mary Brett was the subject of a trespassing warrant, and he asked Sobel for Mary Brett's home address. Pet. App. 2a; Gov't C.A. Br. 7.

2. Petitioner was charged with impersonating federal employees, in violation of 18 U.S.C. 912.[1] Each of the three counts of the indictment alleged that petitioner "did knowingly, willfully and unlawfully falsely assume and pretend to be an officer and employee acting under the authority of the United States and a department and agency thereof * * * and act as such, and in such pretended character demanded * * * a thing of value[.]" C.A. App. 9-11. The district court found petitioner guilty on all three counts. *Id.* at 172-173.

Before trial, petitioner moved to dismiss the indictment because the three counts did not allege that he acted with an intent to defraud. Gov't C.A. Br. 4-5; C.A. App. 21-22. On the first day of trial, the district court orally denied the motion. Gov't C.A. Br. 6; C.A. App. 82.

After he was sentenced, petitioner moved to vacate his convictions pursuant to 28 U.S.C. 2255 on the grounds that the three counts of the indictment were duplicitous and that he had not received effective assistance of counsel. At the same time, he moved pursuant to Fed. R. Crim. P. 33 for a new trial by a jury. Gov't C.A. Br. 8-9;

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[1] Section 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

C.A. App. 215-232. The district court denied the motions. Gov't C.A. Br. 9; C.A. App. 241-243.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-6a. The court rejected petitioner's claim that the indictment was insufficient because the "thing of value" described in each of the three counts did not have commercial or pecuniary value. *Id.* at 3a-4a. "To be sufficient," the court explained, "an indictment only needs to allege that the defendant's conduct satisfies all the elements of the crime with which he is charged." *Id.* at 3a. Because "[e]ach count of the indictment stated that [petitioner] demanded a 'thing of value[,]'" the court "[found] that the indictment was sufficient." *Id.* at 4a.

The court of appeals likewise rejected petitioner's claim that the evidence at trial was insufficient to sustain his convictions on the three counts of impersonating a federal employee. Pet. App. 4a-5a. The court observed that "18 U.S.C. § 912 sets out two distinct crimes: first, where one 'pretends to be an officer or employee acting under authority of the United States . . . and acts as such,' and second, where one 'in such pretended character demands or obtains any money, paper, document, or thing of value.'" *Id.* at 4a. The court noted that "the government proved that [petitioner] not only represented to three individuals that he was an employee of various federal agencies but also sought access to private information by virtue of his false authority." *Id.* at 5a. The court found that "[petitioner's] use of the authority inherent in his false identities to gain access to private information amounted to an assertion of false authority and thus fulfills the 'acts as such' requirement of 18 U.S.C. § 912." *Ibid.* Because the evidence was sufficient to sustain petitioner's convictions on the three counts for the first

offense prohibited by Section 912, the court concluded that it "need not address [petitioner's] challenge to the sufficiency of the evidence as to the second offense." *Id.* at 4a.

Finally, the court of appeals did not address petitioner's claim that the indictment was duplicitous because each count charged both offenses under Section 912. Pet. App. 3a n.1. After noting that petitioner had filed a separate notice of appeal from the district court's denial of his post-sentence motion to vacate his convictions pursuant to 28 U.S.C. 2255 because of duplicity in the indictment and ineffective assistance of counsel, the court stated: "By Order dated September 23, 1993, we affirmed the district court's denial of the [petitioner's] section 2255 motion to vacate." Pet. App. 3a n.1. The court therefore "decline[d] to reconsider the propriety of the district court's judgment as to these issues in this appeal." *Ibid.*[2]

ARGUMENT

1. Petitioner contends (Pet. 6-10) that his convictions for impersonating a federal employee under 18 U.S.C. 912 should be reversed because the indictment did not allege, and the government was not expressly required to prove, that he acted with an intent to defraud. Although petitioner raised that claim in his pretrial motion to dismiss the indictment in the district court, petitioner did not renew that claim in the court of appeals, and the court of appeals did not address it. See Pet. C.A. Br. 6-22; Pet. C.A. Reply Br. 1-5. "Where issues are neither raised

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[2] As petitioner notes (Pet. 4 nn.1, 2), the court of appeals' belief that its September 23, 1993, order had affirmed the district court's denial of petitioner's motion to vacate pursuant to 28 U.S.C. 2255 was mistaken. See Pet. App. 10a.

before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); see also, *e.g.*, *Berkemer* v. *McCarthy*, 468 U.S. 420, 443 (1984); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 759-760 n.6 (1984).

In any event, petitioner's claim does not warrant review by this Court. Before the revision of Title 18 in 1948, a conviction under 18 U.S.C. 76 (1940), the predecessor statute to Section 912, explicitly required an "intent to defraud either the United States or any person." In *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943), this Court explained that "the words 'intent to defraud,' in the context of this statute, do not require more than that the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct."

In 1948, Congress deleted the "intent to defraud" language when it recodified the false personation statute as 18 U.S.C. 912. See Act of June 25, 1948, Pub. L. No. 772, ch. 645, § 912, 62 Stat. 742. According to the pertinent part of the Reviser's Notes, "[t]he words 'with intent to defraud the United States or any person' * * * were omitted [from the revised section] as meaningless in view of *United States* v. *Lepowitch*." H.R. Rep. No. 304, 80th Cong., 1st Sess., A74 (1947). Thus, Congress concluded that the "intent to defraud" element was superfluous in light of *Lepowitch*.

Despite the 1948 revision, the Fifth Circuit subsequently concluded that an indictment charging a violation of Section 912 had to contain an allegation that the defendant acted with an intent to defraud. See *United States* v. *Pollard*, 486 F.2d 190, 191 (1973); *United States* v. *Randolph*, 460 F.2d 367, 369-370 (1972); *Honea* v.

United States, 344 F.2d 798, 801-804 (1965). In contrast, eight other circuits have concluded that "intent to defraud" is not required to be specifically pleaded in a Section 912 prosecution. *United States* v. *Rose*, 500 F.2d 12, 14-17 (2d Cir. 1974), vacated on other grounds, 422 U.S. 1031 (1975); *United States* v. *Wilkes*, 732 F.2d 1154, 1155-1159 (3d Cir.), cert. denied, 469 U.S. 964 (1984); *United States* v. *Guthrie*, 387 F.2d 569, 570-572 (4th Cir. 1967), cert. denied, 392 U.S. 927 (1968); *United States* v. *Cord*, 654 F.2d 490, 491-492 (7th Cir. 1981); *United States* v. *Robbins*, 613 F.2d 688, 690-692 (8th Cir. 1979); *United States* v. *Mitman*, 459 F.2d 451, 453 (9th Cir.), cert. denied, 409 U.S. 863 (1972); *United States* v. *Gayle*, 967 F.2d 483, 485-488 (11th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1402 (1993); *United States* v. *Maxwell*, 920 F.2d 1028, 1037 & n.12 (D.C. Cir. 1990); *United States* v. *Rosser*, 528 F.2d 652, 654-658 (D.C. Cir. 1976).

The Fifth Circuit's disagreement with the other eight circuits does not appear to reflect any substantial difference in the elements the government must prove to convict a defendant of a violation of Section 912. Although the Fifth Circuit alone requires that an indictment under Section 912 expressly allege intent to defraud, there is basic and uniform agreement between the Fifth Circuit and the other eight circuits that the government must prove that the defendant satisfied the intent requirement set out in *Lepowitch*, 318 U.S. at 704—*i.e.*, that he "by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." See, *e.g.*, *Rosser*, 528 F.2d at 656 ("virtually everyone who pretends to be an officer or employee of the United States and in some manner asserts authority by acting 'as such' seeks to cause the deceived person to follow some course he would not have pursued but for the

deceitful conduct") (internal quotation marks omitted); *Wilkes*, 732 F.2d at 1158 ("intent to defraud as defined by the Supreme Court in *Lepowitch* would be present whenever the element 'acting as such' was proven"); *Cord*, 654 F.2d at 492 ("implicit in the remaining language is the requirement that the 'acts' and 'demands' cause a victim to follow a path he would not otherwise have taken"); *Robbins*, 613 F.2d at 691 ("the language in *Lepowitch* puts some substance in the 'acts as such' element, requiring reliance on the impersonator's assertion of authority"); *Gayle*, 967 F.2d at 487 (adopting approach of *Rosser*).[3] The only issue on which there is a substantial difference concerns whether the *Lepowitch* intent requirement is an independent element of pleading and proof, or whether it is established as part of the proof of the other elements of the offense. Further review by this Court to resolve that largely semantic disagreement is not necessary.

Finally, this Court denied review of this issue in *United States* v. *Gayle*, 967 F.2d 483 (11th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1402 (1993), and *United*

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[3] Petitioner notes (Pet. 9-10) that the Second, Fourth, Seventh, and Ninth Circuits have emphasized the elimination of the "intent to defraud" requirement under Section 912, see *Rose*, 500 F.2d at 16-17; *Guthrie*, 387 F.2d at 571; *Cord*, 654 F.2d at 492; *Mitman*, 459 F.2d at 453, while the Third, Eighth, Eleventh, and D.C. Circuits have reasoned that an indictment need not allege intent to defraud because the requisite intent is "present whenever the elements retained in section 912 are proven." *Wilkes*, 732 F.2d at 1159; see *Robbins*, 613 F.2d at 691; *Gayle*, 967 F.2d at 486-487; *Rosser*, 528 F.2d at 656-658. Because there is no practical distinction between the view that "intent to defraud" is not an essential element of Section 912 and the view that it is subsumed in the other elements of that provision, any difference in approach that may exist is inconsequential and does not warrant this Court's review.

States v. *Wilkes*, 732 F.2d 1154 (3d Cir.), cert. denied, 469 U.S. 964 (1984). Since that time, there has been no development warranting a different result in this case. Moreover, since the Fifth Circuit stands alone in requiring a Section 912 indictment to charge explicitly an intent to defraud and since the Fifth Circuit's most recent pronouncement on the issue in *United States* v. *Pollard*, *supra*, is over 20 years old,[4] the Fifth Circuit may reconsider its position if the occasion arises.

2. Petitioner also contends (Pet. 10-12) that he was prejudiced in his trial preparation and his ability to present his defense because the three counts of the indictment charging both offenses under 18 U.S.C. 912 were duplicitous. Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides, however, that objections based on defects in the indictment, such as duplicity, must be raised before trial. Here, petitioner did not challenge the indictment on the ground of duplicity before trial. Rather, he first challenged the indictment on that ground after he had been sentenced when he moved to vacate his conviction pursuant to 28 U.S.C. 2255. Consequently, petitioner waived his claim that the indictment was duplicitous by failing to raise it in a timely manner. See, *e.g.*, *United States* v. *Baytank (Houston), Inc.*, 934 F.2d 599, 608-609 (5th Cir. 1991); *United States* v. *Gordon*, 844 F.2d 1397, 1400 (9th Cir. 1988) (collecting cases).

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[4] In *United States* v. *Cohen*, 631 F.2d 1223, 1224 (5th Cir. 1980), the court referred to the standard adopted by *Pollard*, *Randolph*, and *Honea*, but the court in *Cohen* upheld an indictment that included an allegation of intent to defraud. Consequently, it had no occasion to determine whether an indictment that did not include that allegation would have been sufficient.

In any event, petitioner's claim (Pet. 11) does not warrant review by this Court. The government conceded in the court of appeals that the three counts of the indictment in this case were duplicitous under *United States* v. *Leggett*, 312 F.2d 566, 569 (4th Cir. 1962).[5] Gov't C.A. Br. 9-10. It is well settled, though, that duplicity in an indictment "is not fatal, and does not require dismissal of the count." 1 C. Wright, *Federal Practice and Procedure: Criminal* § 145, at 523 (2d ed. 1982).[6] Here, petitioner suffered no prejudice as a result of the duplicity in each count of the indictment. Because the district court was the trier of fact, there was no risk of a nonunanimous verdict on any count at petitioner's bench trial. Moreover, because his acts of impersonation of a federal employee were intertwined with his demands for things of value, the duplicity in each count had no effect on petitioner's ability to prepare his defense. See *United States* v. *Kimberlin*, 781 F.2d 1247, 1250-1252 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986). Petitioner's fact-

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[5] Contrary to petitioner's contention (Pet. 12), there is no "direct conflict" among the circuits over whether a single count charging both offenses under Section 912 is duplicitous. Rather, the courts of appeals uniformly agree that a single count charging both offenses is duplicitous. See *United States* v. *Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986); *United States* v. *Aguilar*, 756 F.2d 1418, 1420 (9th Cir. 1985); *United States* v. *Leggett*, 312 F.2d 566, 568-569 (4th Cir. 1962).

[6] When a defendant timely objects to duplicity under Fed. R. Crim. P. 12(b)(2), "[t]he proper remedy is to require the government to elect upon which charge contained in the count it will rely." 1 C. Wright, *Federal Practice and Procedure: Criminal* § 145, at 523 (2d ed. 1982). Had petitioner objected before trial in this case, the government could have elected which charge to pursue, or it could have sought a superseding indictment charging petitioner in six, rather than three, counts.

bound claim to the contrary does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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